A

DATARAN RENTAS SDN BHD

v.

BMC CONSTRUCTION SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: P-02-669-1999]

C

20 SEPTEMBER 2007

COMPANY LAW: *Winding up - Opposition to winding up - Company's failure to make payment under architect's interim certificates issued under building contract - Whether debt disputed on substantial*

D

grounds - Whether bona fide - Whether contract included right of set off

CONTRACT: *Building contract - Architect's interim certificates - Failure to make payment - Whether contract rightfully determined - Whether contract incorporated right of set off - Whether debt disputed on substantial grounds*

E

This appeal stemmed from the respondent's claim against the appellant for the sum of RM173,096.18 due under four interim certificates issued under a building contract entered into by the parties concerned. The terms and conditions of the contract were

F

as per the PAM Standard Form Building Contract 1969 ('PAM conditions'). When the appellant failed to pay the sums due under the said certificates the respondent filed a winding-up petition against the appellant. The appellant was accordingly wound up and that led to the appeal herein. The appellant also filed a civil

G

suit against the respondent claiming breach of contract.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

H

(1) On a true construction of cls. 26(1)(a) and 30(1) of the contract, the appellant's obligation to make payment on an interim certificate was a primary obligation. Since the appellant did not fulfil a primary obligation of the building contract, the respondent was entitled to treat the contract as at an end. (para 3)

I

(2) The question whether a building contract admits a right of set off is one that turns upon the true construction of the particular contract. In the present case, the common law and equitable rights of set off have been modified by the terms of the contract. The contractual conditions precedent to the exercise of the right of set off were clearly absent here and as such the appellant could not on the facts assert the right. (para 4)

(3) Once the respondent had a debt due to it from the appellant that remained unsatisfied, it was entitled to present a winding up petition. All issues that went to challenge the debt might be dealt with at the hearing of the petition. Since the debt was not *bona fide* disputed on substantial grounds, the High Court was entirely correct in directing that the appellant be wound up. (paras 5 & 6)

Per Zulkefli Makinudin JCA:

(1) Clause 26(1)(a) of the PAM Conditions gave the respondent the contractual right to determine the respondent's employment under the contract in the event of the failure of the appellant to pay within the time stipulated under cl. 30(1). (para 9)

(2) The appellant had no permissible set off under the PAM Contract against the certified sum. There was no architect's instruction given under cl. 2(1) that the works carried out by the respondent was defective. Neither was there any instruction by the architect under cl. 6(4) for the removal from site of any work, materials or goods which were not in accordance with the contract at all material time prior to the determination of the contract. Based on the principles laid down by the Federal Court in the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd*, the appellant had no right to deduct or set off against the sums certified under the interim certificates. The respondent was entitled to payment immediately and as such the debt could not be disputed and the appellant had no meritorious defence. (paras 9 & 10)

(3) The appellant's allegation that the determination of contract by the respondent was wrong and that there were defective works was an afterthought. It was wholly inconsistent with their conduct both before and after the determination of the contract. Prior to the determination of the contract there was never any complaint from the architect in the form of the architect's instructions of any failure or breach of contract on the part of the respondent. There was also no cross-claim certified by the architect that entitled the appellant to set-off such cross claim against the certificates issued in favour of the respondent. It therefore followed that the respondent's contractual determination under cl. 26(1)(a) of the PAM Conditions was justified and rightly made. The appellant's allegation that it was a wrongful determination must fail and the appellant was not entitled to any right of set off. The appellant had no *bona fide* dispute or counterclaim against the respondent. (para 10)

(4) If the appellant thought the determination of the contract was wrong, they should have referred the matter for arbitration. There was a provision in cl. 34 of the PAM Conditions which stated that the disputes between the appellant and the respondent might be referred to arbitration. Instead the appellant sought to negotiate with the respondent for a reduction of the sums due and resumption of work. It was also noted that the appellant did not call upon the guarantee given. If the respondent had been in breach of contract, the appellant would have been expected to call on the guarantee. (para 11)

(5) The appellant only filed its civil suit against the respondent after the winding-up petition was filed. That showed that the appellant was not acting in *bona fide* and their allegations were a mere afterthought. Furthermore, the lack of *bona fides* in the appellant's purported claim could be seen in the report of one Messrs. Mokhtar & Associates upon which the appellant sought to rely to support their contention that their claim was more than the respondent's claim in the interim certificates. That report was undated and was only introduced by way of the appellant's affidavit about one year after the determination of the contract. That report was neither sanctioned nor verified by the architect who was the Superintendent Officer

of the project concerned. It was strange why the appellant did not engage the architect to prepare a report of his inspection since it was the architect who carried out the joint inspection following the determination of the contract. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini berbangkit dari tuntutan responden terhadap perayu untuk jumlah RM173,096.18 yang tertunggak di bawah empat sijil interim yang dikeluarkan di bawah kontrak bangunan yang dimeterai oleh pihak-pihak terbabit. Terma dan syarat-syarat kontrak adalah seperti di dalam Kontrak Bangunan Standard PAM 1969 ('syarat-syarat PAM'). Apabila perayu gagal membayar jumlah yang tertunggak di bawah sijil-sijil tersebut, responden telah memfailkan petisyen penggulungan terhadap perayu. Berikutnya perayu telah digulung sekaligus membawa kepada rayuan di sini. Perayu juga memfail satu guaman sivil terhadap responden mendakwa berlaku kemungkiran kontrak.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Atas pentafsiran sebenar fasal 26(1)(a) dan 30(1) kontrak, obligasi perayu untuk membuat pembayaran di atas sijil interim merupakan obligasi utama. Oleh kerana perayu tidak memenuhi obligasi utama kontrak bangunan, responden berhak untuk menganggap kontrak sebagai telah berakhir.

(2) Persoalan sama ada suatu kontrak bangunan mengandungi hak untuk membuat set off adalah perkara yang bergantung kepada pentafsiran sebenar kontrak tersebut. Dalam kes semasa, hak-hak common law dan ekuiti set off telah diubahsuai oleh terma-terma kontrak. Syarat-syarat duluan kontrakual bagi pelaksanaan hak set off jelas tidak wujud di sini, dan oleh kerana itu, perayu tidak boleh di atas fakta menuntut hak tersebut.

(3) Sebaik sahaja responden mempunyai hutang yang perlu dibayar kepadanya oleh perayu yang belum dijelaskan, ia berhak untuk mengemukakan petisyen penggulungan. Semua isu-isu yang mencabar hutang boleh ditangani semasa pendengaran petisyen. Oleh kerana hutang tidak secara *bona fide* dipertikai atas alasan-alasan substantial, maka Mahkamah Tinggi betul sepenuhnya apabila memerintahkan perayu digulung.

Oleh Zulkefli Makinudin HMR:

(1) Fasal 26(1)(a) Syarat-syarat PAM memberikan responden hak kontraktual untuk mengakhiri perkhidmatannya di bawah kontrak jika berlaku kegagalan perayu untuk membayar dalam tempoh masa yang ditetapkan di bawah fasal 30(1).

(2) Perayu tidak mempunyai apa-apa set off yang dibenarkan di bawah Kontrak PAM terhadap jumlah yang disahkan. Tidak ada arahan arkitek diberi di bawah fasal 2(1) bahawa kerja-kerja yang dilaksanakan oleh responden itu cacat. Juga tidak terdapat arahan arkitek di bawah fasal 6(4) pada bila-bila masa pun bagi pengalihan kerja, material atau barang-barang dari tempat kerja kerana tidak selaras dengan kontrak sebelum penamatan kontrak. Berdasarkan prinsip-prinsip yang diutarakan oleh Mahkamah Persekutuan di dalam kes *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd*, perayu tidak mempunyai hak untuk memotong atau set off jumlah yang disahkan di bawah sijil-sijil interim. Responden berhak kepada pembayaran dengan serta merta. Kerana itu hutang tidak boleh dipertikai dan perayu tidak mempunyai pembelaan yang bermerit.

(3) Dakwaan perayu bahawa penamatan kontrak oleh responden adalah salah dan bahawa wujud kerja-kerja yang cacat adalah sesuatu yang direka kemudian. Ia amat tidak konsisten dengan kelakuan mereka sebelum dan juga selepas penamatan kontrak. Sebelum penamatan kontrak, tidak terdapat apa-apa rungutan oleh arkitek dalam bentuk arahan arkitek berkaitan apa-apa kegagalan atau kemungkiran kontrak di pihak responden. Juga, tidak terdapat apa-apa tuntutan-balas yang disahkan oleh arkitek yang melayakkan perayu untuk membuat set-off tuntutan balas berkenaan dengan sijil-sijil yang dikeluarkan untuk manfaat responden. Ianya dengan itu mengikut bahawa penamatan kontrak responden di bawah fasal 26(1)(a) Syarat-syarat PAM adalah berjustifikasi dan dibuat dengan betul. Alegasi perayu bahawa ia adalah penamatan yang salah semestinya gagal dan perayu tidak berhak kepada apa-apa hak set off. Perayu juga tidak mempunyai pertikaian atau tuntutan balas yang *bona fide* terhadap responden.

(4) Jika perayu merasakan penamatan kontrak adalah salah, mereka seharusnya merujuk perkara itu kepada timbangtara. Terdapat peruntukan di fasal 34 Syarat-Syarat PAM yang menyatakan bahawa sebarang pertikaian di antara perayu dan responden boleh dirujuk kepada timbangtara. Perayu sebaliknya memilih untuk berunding dengan responden untuk mengurangkan jumlah yang kena dibayar serta untuk penerusan kerja-kerja. Harus juga diingat bahawa perayu tidak memberi perhatian kepada jaminan yang diberi. Jika responden telah memungkiri kontrak, perayu sepatutnya bertindak atas jaminan tersebut.

(5) Perayu hanya memfailkan guaman sivil terhadap responden selepas petisyen penggulungan difailkan. Itu menunjukkan bahawa perayu tidak bertindak secara *bona fide* dan dakwaan-dakwaan mereka hanyalah satu rekaan. Selain itu, ketandusan *bona fides* dalam tuntutan perayu dapat dilihat pada laporan yang dibuat oleh Messrs. Mokhtar & Associates yang perayu bergantung bagi menyokong hujah mereka bahawa tuntutan mereka adalah melebihi tuntutan responden di dalam sijil-sijil interim. Laporan tersebut tidak bertarikh dan hanya dikemukakan melalui afidavit perayu setahun selepas penamatan kontrak. Laporan itu tidak disanksikan atau disahkan oleh arkitek yang menjadi Pegawai Penguatkuasa projek berkenaan. Adalah janggal mengapa perayu tidak mengkhidmat arkitek bagi menyediakan laporan pemeriksaan sedangkan arkitek tersebutlah yang menjalankan pemeriksaan bersama ekoran penamatan kontrak.

Case(s) referred to:

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Ellis Mechanical Services Ltd v. Wates Construction Ltd [1978] 1 Lloyd's Rep 33 ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC ***(refd)***

Shanghai Hall Ltd v. Town House Hotel Ltd [1967] 1 LNS 158 FC ***(refd)***

Stonegate Securities Ltd v. Gregory [1980] 1 Ch 576 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)

For the appellant - JA Yeoh; M/s Shearn Delamore & Co
For the respondent - Karin Lim; M/s Lim Leng Han & Co

[Appeal from High Court, Pulau Pinang; Companies Winding Up No: 28-87-1998]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] I have read the judgment of my learned brother Zulkefli and agree with the views he has expressed. I merely wish to add a few words on three aspects of this case to what my learned brother has already said.

[2] First there is the issue of the sums due from the appellant to the respondent for work done. The importance of an employer to pay sums due on an architect's interim certificate has been emphasised on numerous occasions. So, in *Ellis Mechanical Services Ltd v. Wates Construction Ltd* [1978] 1 Lloyd's Rep 33, Lawton LJ said:

> If the main contractor can turn round, as the main contractor has done in this case and say, 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life-blood. It seems to me that the administration of justice in our courts should do all it can to restore that life-blood as quickly as possible.

[3] In my judgment, on a true construction of cls. 26(1)(a) and 30(1) of the contract in the present case, the appellant's obligation to make payment on an interim certificate is a fundamental term or to put it slightly differently, a primary obligation. Since the appellant did not fulfil a primary obligation of the building contract, the respondent was entitled to treat the contract as at an end. See, *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287.

[4] The second issue is the appellant's alleged right to a set off. As a general rule, every contracting party has, in equity, a right to set off any sum – liquidated or unliquidated – that may be due from the other provided it arises out of the same or substantially the same transaction. See, *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 241, *Shanghai Hall Ltd v. Town House Hotel Ltd* [1967] 1 LNS 158. But, like any other common law or equitable right it is capable of exclusion or modification by contract. And where this has happened, the former ceases to be exercisable. See, *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345. Thus, the question whether a building contract admits a right of set off is one that turns upon the true construction of the particular contract. In the present case, as pointed out by my learned brother, the common law and equitable rights of set off have been modified by the terms of the contract. The contractual conditions precedent to the exercise of the right to a set off were clearly absent here and as such the appellant could not on the facts assert the right.

[5] The third point is this. Once the respondent had a debt due to it from the appellant that remained unsatisfied, it was entitled to present a winding up petition. All issues that go to challenge the debt may be dealt with at the hearing of the petition. As Wan Hamzah SCJ said in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[6] In the present instance the debt was not *bona fide* disputed on substantial grounds. See, *Stonegate Securities Ltd v. Gregory* [1980] 1 Ch 576. As such the High Court was entirely correct in directing that the appellant be wound up.

A **Zulkefli Makinudin JCA:**

Introduction

[7] This is an appeal by the appellant (the respondent in the court below) against the decision of the High Court at Penang wherein on a winding-up petition filed by the respondent (the petitioner in the court below) against the appellant, the High Court had made the following orders:

(i) that the appellant be wound up pursuant to the provisions of the Companies Act 1965;

(ii) that the Official Receiver be appointed the provisional liquidator of the appellant; and

(iii) that the costs of the petition be paid out of the assets of the appellant.

Background Facts

[8] The relevant background facts leading to the filing of the winding-up petition by the respondent against the appellant are as follows:

(1) The respondent's claim against the appellant is for the sum of RM173,096.18 due and owing by the appellant to the respondent pursuant to four interim certificates issued under a building contract entered into between the two parties.

(2) By a letter of award dated 29 July 1997, the appellant awarded a building contract to the respondent.

(3) Pursuant to the letter of award, it was agreed that the terms and conditions of contract are as per PAM Standard Form Building Contract 1969 Edition (without Quantities) ("PAM Conditions").

(4) Pursuant to cl. 30(1) of the PAM Conditions read together with the Appendix, the appellant was contractually obliged to pay the respondent the amount due under Interim Certificate within thirty days.

(5) The appellant has failed to pay the following interim certificates within the stipulated time stated under cl. 30(1) of the PAM Conditions.

Certificate No.	Dates	Amount Due
5	15 January 1998	RM 23,876.74
6	15 February 1998	RM 23,986.80
7	16 March 1998	RM 68,086.41
8	16 April 1998	RM 57,146.23
		RM173,096.18

(6) Certificate No. 1 to 4 was partly paid in cash and in kind through contra by way of respondent's purchase of one semi-detached industrial unit in the same project from the appellant as the appellant was short of cash and there was never any dispute as to the certificate.

(7) Clause 26(1)(a) of the PAM Conditions reads:

> Without Prejudice to any other rights and remedies which the contract may possess, if:
>
> (a) The Employer does not pay to the contractor the amount due on any certificate within the period for Honouring Certificates named in the appendix to these conditions and continues such default for seven days after receipts by registered post … then the contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously.

(8) By virtue of the breach of contract on the part of the appellant to honour payment of interim certificates, the respondent had *vide* their solicitors wrote to the appellant on 11 April 1998 of intention to determine the contract unless payment of sums due under the interim certificates was made. The appellant failed to pay the said sums due.

(9) The respondent had on 24 April 1998 *vide* solicitors wrote to the appellant to determine the contract under cl. 26(1)(a) of the PAM Conditions.

(10) At that material time, the appellant did not challenge the respondent's determination of 24 April 1998 nor took steps to refer the matter for arbitration under cl. 34 of the PAM Conditions.

(11) Following the determination of the contract, the appellant had through the architect wrote to the respondent on 26 June 1998 and proposed terms of an amicable settlement. However, parties could not agree.

(12) On 29 July 1998, the respondent issued a s. 218(2)(1) notice under the Companies Act 1965 to the appellant who refused and neglected to pay and pursuant to that the respondent filed a winding-up petition pursuant to s. 218(1)(e) read with s. 218(2)(a) of the Companies Act 1965 to wind up the company on the basis that the company is unable to pay its debt.

(13) On 16 September 1998, the winding-up petition was presented against the appellant. The appellant company was wound up on 13 July 1999. There is no stay of proceedings.

(14) It was only after the presentation of the winding-up petition against the appellant that the appellant filed the Civil Suit No. 895 in the Penang High Court on 29 October 1998 against the respondent claiming breach of contract.

Decision Of The Court On Appeal

[9] We are of the view based on cl. 26(1)(a) of the PAM Conditions, it gives the respondent the contractual right to determine the respondent's employment under the contract in the event of the failure of the appellant to pay within the time stipulated under cl. 30(1). On this point it is to be noted that in the case of *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela's Medical Centre Sdn. Bhd.* [1995] 2 CLJ 345, the Federal Court held *inter alia* that by virtue of the express provisions of the contract allowing contractual right of set off, it was construed that the contract excludes the operation of common law rights of set off. As such, the employer's right of set off against the sum due under the contract is restricted to those expressly allowed under the contract. In the present case the appellant have no permissible set off under the PAM Contract against the certified sum. There

was no architect's instruction given under cl. 2(1) that the works carried out by the respondent was defective. Neither was there any instruction of the architect given under cl. 6(4) for the removal from site of any work, materials or goods which are not in accordance with the contract at all material time prior to the determination of the contract on 24 April 1998.

[10] Applying the legal principles laid down by the Federal Court in *Pembenaan Leow Tuck Chui*'s case, it is our judgment that the appellant have no right to deduct or set off against the sums certified under the interim certificates. The respondent is entitled to payment immediately and as such the debt cannot be disputed and the appellant has no meritorious defence. The appellant's allegation that the determination of contract by the respondent was wrong and that there were defective works is an afterthought. It is wholly inconsistent with their conduct both before and after the determination of the contract on 24 April 1998. Prior to the determination of the contract there was never any complaint from the architect in the form of architect's instructions of any failure or breach of contract on the part of the respondent. A reference to the Architect's Interim Certificates No. 5, 6, 7 and 8 would show the architect had stated in all these certificates a statement which reads "Addition/Deduction for works not in accordance with the Contract" as being "RM nil". This fact clearly shows there was no breach by the respondent. There was also no cross-claim which has been certified by the architect which entitles the appellant to set off such cross-claim against the certificates issued in favour of the respondent. It therefore follows that the respondent's contractual determination on 24 April 1998 under cl. 26(1)(a) of the PAM Conditions was justified and rightly made. The appellant's allegation that it was a wrongful determination must fail and the appellant is not entitled to any right of set off. The appellant has no *bona fide* dispute or counterclaim against the respondent.

[11] We are also of the view if the appellant thought the determination of the contract was wrong, they should have referred the matter for arbitration. There is a provision in cl. 34 of the PAM Conditions which states that the disputes between the appellant and the respondent may be referred to arbitration. Instead the appellant had sought to negotiate with the respondent for a reduction of the sums due and resumption of work. It is

also noted that the appellant did not call upon the Insurance Guarantee granted by Malaysia British Assurance Berhad dated 23 September 1997 which guaranteed the sum of RM140,000 in favour of the appellant in the event the respondent failed to perform the contract. The guarantee was effective from 2 August 1997 to 6 December 1998. If there is any truth in the appellant's allegation that the respondent was in breach in determining the contract on 24 April 1998, one would have expected the appellant to call on the guarantee.

[12] The appellant only filed the Civil Suit No. 895 against the respondent after the winding-up petition was filed. This shows that the appellant was not acting *bona fide* and their allegations were mere afterthought. Furthermore the lack of *bona fides* in the appellant's purported claim can be seen in the report of Messrs. Mokhtar & Associates which was undated and upon which the appellant have sought to rely to support their contention that their claim is more than the amount as claimed by the respondent in the interim certificates. This report was undated and was only introduced by way of the appellant's affidavit dated 19 April 1999. This was about one year after the determination of the contract on 24 April 1998. This report was not sanctioned nor verified by the architect who was the Superintendent Officer of the project concerned. It is indeed strange why the appellant did not engage the architect to prepare a report of his inspection since it was the architect who carried out the joint inspection in 1998 following the determination of the contract.

Conclusion

[13] For the reasons already stated we would dismiss the appellant's appeal with costs and make an order that the deposits be paid to the respondent to account of taxed costs.